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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Marriage of ALICIA and ADRIAN
RAMSEY.

B212724

(Los Angeles County
Super. Ct. No. BD417310)

ALICIA RAMSEY,

Appellant,

v.

ADRIAN RAMSEY,

Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Louis Meisinger, Judge. Affirmed.

Law Offices of Wanda Y. Belle, Wanda Y. Belle for Appellant.

Fox and Fox, Frank O. Fox, Claire S. Fox for Respondent.

This appeal is from the judgment of dissolution of marriage between appellant Alicia Ramsey (wife) and respondent Adrian Ramsey (husband), and the ensuing denial of wife's motion for a new trial or alternatively to set aside the judgment (Code Civ. Proc., § 473).¹ Wife's contentions are without merit because: (1) her motion for a new trial was not timely filed and, in any event, did not establish "accident" or "surprise" based on attorney abandonment because "ordinary prudence" (§ 657, subd. 3) could have guarded against it; (2) the judgment (and the custody and visitation agreement incorporated into it) may not be set aside under section 473 based on attorney neglect because there was a contested trial, not a default; and (3) the court did not err in granting husband's motion in limine or abuse its broad discretion in denying wife's request for a continuance. We thus affirm.

FACTUAL AND PROCEDURAL SUMMARY

The parties were married in December of 2000, and separated in October of 2004. In November of 2004, wife filed a petition for dissolution of marriage. Approximately three years later, husband filed an ex parte request seeking sole legal and physical custody of their two children (born in 1997 and 2003), who had been in wife's custody. Husband, who was employed as a mail carrier for the post office, alleged that wife was on welfare, used crack cocaine, had a boyfriend who was a drug dealer, and had a lifestyle that endangered the two children.

The court was skeptical of husband's claims and denied his ex parte request for sole custody and for wife's monitored visitation and drug testing. Later that day, on December 12, 2007, the parties signed a settlement agreement as to child custody, with the agreement to "be incorporated into a final judgment." They agreed on joint legal custody of the two children, with husband having physical custody of them every week from Friday evening to Tuesday evening, and wife having physical custody from Tuesday evening to Friday evening.

¹ Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

At the May 2, 2008, trial setting conference, husband announced ready, and the court set the matter for trial on May 22, 2008. On that trial date, however, the trial was continued to August 7, 2008, because husband's counsel was engaged in a trial. On July 31, 2008, husband filed his trial brief, exhibit list, and witness list. On the August 7 trial date, counsel for husband appeared, and wife was present, but counsel for wife (Thomas R. Lee) sent an attorney (Leo Kohn) to specially appear and stand in for him. Attorney Kohn stated that wife's counsel had filed a "notice of unavailability with the court." The court remarked that there was "no explanation" for his failure to appear. The court also noted that counsel for wife did not respond to requests for a joint trial brief, did not file proofs of service of preliminary and final disclosure declarations, and did not file an individual trial brief. The court then set a new trial date for August 27.

On August 27 and 28, 2008, a trial ensued on all issues except custody and visitation, which had been resolved by the prior stipulation. At the outset of the first day of the trial, wife appeared with an attorney (David Abrams) who stated, "The only authority I have to be here is to ask for a continuance. . . . I don't have the file, your Honor. I have no paperwork on this case except my client's motion for modification of child support and child custody. I don't have any documents to produce. I have no information whatsoever on the house. I have nothing. My client doesn't have information about it. I was contacted last evening by Mr. Lee's office [wife's counsel] through [an] appearance attorney's firm to be here to ask for a continuance today." When the trial court inquired as to the grounds for the continuance, counsel replied, "The grounds that Mr. Lee couldn't be here today. . . . I don't know what he's doing. I just get my information from an appearance company, and they contacted me. And they just said this is just--something to this effect--this is just a child support modification and custody modification, something about a trial." The court explained that "there is a little thing about a trial," as well as several other matters, such as an order to show cause as to sanctions for failure to follow trial setting orders, a contempt hearing for failure to comply with court orders and failure to appear with records, and an in limine motion to exclude all witnesses and exhibits.

The court took several of the matters off calendar, but awarded counsel for husband \$1,775 in attorney fees as a sanction, observed that wife's counsel had not appeared for two consecutive trial dates, and expressed concern about balancing the problem of the conduct of wife's counsel with the right of husband to have his day in court. The court then requested that both wife and counsel for husband contact counsel for wife (Thomas R. Lee), and the court set the matter for trial later that afternoon.

Later that afternoon, counsel for husband was present but not counsel for wife. Wife indicated that she had just previously spoken to someone in counsel's office who stated that some "paperwork concerning the property" was not yet available and "instructed [her] not to stay" in the courtroom. However, she told the trial court, "And I'm, like, this needs to be heard. . . . I'm so at a loss, but I have as much paperwork as I have to try and, I guess, get this done." The court replied, "This was the time set for trial. It's been continued before because of a nonappearance. I just can't see any justification for not having the trial today." The court then advised wife that she can ask "to substitute your lawyer out and put yourself in as in *propria persona*. If your lawyers advised you to leave, that's a prerogative you ought to think about. That's a choice you ought to think about, too. I'm not telling you what to do. But if you still have lawyers, then theoretically you're not representing yourself, and therefore, you have to either testify from the stand or not at all. . . . [Y]ou have to make a choice about whether you want to be a lawyer today or whether you want to be a witness."

Wife voluntarily elected to testify at trial without her attorney. The court deferred hearing husband's unopposed motion in limine to exclude witnesses and exhibits for failure to comply with trial court orders and Family Code procedures, which required wife to have served declarations disclosing the details of her assets and ownership interests. The court deferred ruling on the motion to exclude so that wife could present her case, and it reserved husband's right to move to strike any testimony at the conclusion of the case. On the first day of trial, during approximately an hour 15 minutes of courtroom time, counsel for husband presented direct testimony from husband, who is a postal worker earning approximately \$2,100 per month, and from a real estate appraiser,

who testified as to the 2004 appraisal value (\$335,000) and rental value (\$1,400 a month) of the real property at issue (5708 Eighth Avenue, Los Angeles).

Then, wife began her case by testifying on her own behalf and concluded her testimony the next day. On day two of the trial, wife again appeared without counsel. Wife prepared for her testimony by writing down questions she wanted to ask herself and the answers she intended to give. After she testified, wife recalled husband as a witness. In essence, wife contradicted most of husband's testimony, and she denied receiving any money for the sale of their residence.

At the conclusion of the trial, the court granted husband's prior motion in limine to exclude wife's evidence (i.e., her testimony) for violations of various court rules regarding the production of documents, as set forth in husband's motion. The court found in favor of husband on the core issue of wife's breach of her fiduciary duty to him regarding her transfer and refinancing of the residential property.

On September 26, 2008, the court filed its judgment of dissolution of marriage. The judgment, in pertinent part, reiterated the joint legal custody of the children and provided for their joint physical custody and other orders regarding child custody. The court ordered no spousal support by or to either party, and it divided various items of community property between husband and wife. The court found that wife had willfully and secretly breached her fiduciary duties to husband, within the meaning of Family Code section 1101, subdivision (g), when she (1) obtained a loan secured by the parties' community real property, without advising husband or paying any portion of the loan proceeds to husband, (2) transferred title in community real property without advising husband or paying any portion of the equity to him, and (3) prevented husband from enjoying the use and possession of the real property when she transferred title to it without his knowledge or consent.

As a result of the breaches of fiduciary duty found by the court, the judgment provided as follows: that wife pay to husband \$32,900 for one-half of the rental value of the family residence, and \$85,500 for one-half of the proceeds received from the refinancing and one-half of the equity of the family residence at the time wife transferred

title of the residence to her mother. Finally, the judgment provided that wife pay to husband's attorney \$1,775 for filing a frivolous order to show cause regarding a modification of custody and visitation, and pay an additional \$26,300 in attorney fees and costs to husband's attorney, pursuant to Family Code section 1101, as a result of wife's breach of her fiduciary duties owed to husband.

On September 30, 2008, wife retained new counsel (Attorney Wanda Belle), who is also counsel in the present appeal. She moved for a new trial, or in the alternative to set aside the judgment. Wife alleged accident or surprise as the grounds for a new trial and asserted that her former counsel had abandoned her case without any notice to her. According to wife, she was surprised to discover that August 27, 2008, was the date set for trial, and she did not know until she arrived in court that her attorney was not planning on being present. When she learned her attorney was not coming to court that day, she contacted his office and was advised to leave the court, but she did not do so and opted to proceed on her own with the trial.

Wife further asserted that the court abused its discretion in denying the request for a continuance, made by an attorney specially engaged by her former counsel to make an appearance and to argue for a continuance. Wife urged that to the extent the denial of the continuance was based on a failure to comply with local court rules, the client should not be penalized and any penalty should be imposed on counsel only, pursuant to section 575.2, subdivision (a). Alternatively, wife claimed that the judgment of dissolution should be set aside under section 473, subdivision (b), because her former counsel's neglect amounted to positive misconduct requiring relief from default.

Wife also asserted that a new trial would produce a different result more favorable to her. She declared she could produce unspecified evidence that she did not breach her fiduciary duty, and that issues purportedly remained regarding custody and visitation.

The court denied wife's motion. The court observed that the notice of entry of judgment had been mailed by the clerk on September 26, 2008, to wife's former attorney,

and it found that the motion for a new trial was not timely filed.² The court also remarked that even on the merits, the motion would be unavailing because wife's counsel had a history of failing to show up, the trial date had previously been continued, wife admitted she had not been in touch with her own lawyer, and she thus failed to protect herself from the foreseeable consequence of her lawyer's inaction. Wife's attorney had neglected her long before the trial dates, and she had unreasonably failed to protect herself.

Moreover, the court concluded that the outcome would not be any different if it granted a new trial. The court observed that the core issue in the case concerned wife's quitclaim of the residence to her mother without consideration. The court explained that based on wife's evidence at trial (which it struck), the new trial motion lacked merit and would not result in a different outcome because wife admitted she had quitclaimed the residence to her mother without consideration.

On December 10, 2008, wife's original attorney (Thomas R. Lee) again failed to appear in court regarding the sanctions hearing against him. The court found that he had violated several court orders, including its pretrial orders dated May 2, 2008, by failing to file a joint trial brief, failing to file witness and exhibit lists, and failing to appear in court on September 30, 2008, for a hearing on sanctions. The court imposed sanctions against him in the amount of \$1,500. The court remarked that it would file an official complaint against Attorney Lee with the State Bar of California regarding his behavior in the present case, and it issued another order to show cause why he should not be further sanctioned.

Meanwhile, according to information at the State Bar of California website, of which we have taken judicial notice, on December 6, 2008, Attorney Thomas R. Lee voluntarily became "inactive" and tendered his bar resignation with charges pending. As

² We note that at the court hearing on September 30, 2008, wife's new counsel acknowledged that she had received a copy of the former attorney's files.

of December 6, 2008, he was no longer eligible to practice law.

(http://members.calbar.ca.gov/search/member_detail.aspx?x=61858)

This appeal by wife ensued.

DISCUSSION

I. The trial court did not abuse its broad discretion in denying the motion for a new trial because it was untimely filed and, in any event, would be unavailing.

Wife forfeited her right to request a new trial by failing to comply with mandatory time requirements. Any notice of intention to move for a new trial must be filed within 15 days after the clerk mails the notice of entry of judgment, or within 180 days of entry of judgment, whichever is earliest. (§ 659, noting also that “[t]he time specified above shall not be extended by order or stipulation”) Here, on September 26, 2008, the notice of entry of judgment was mailed by the clerk of the superior court, and more than 15 days later, on October 15, 2008, wife filed her notice of intent to move for a new trial. Because the fifteenth day after the notice of entry of judgment was October 11 (a Saturday) and October 13 (a Monday) was a holiday (Columbus Day), October 14, 2008, would have been the last day to file the notice of intent to move for a new trial.

The notice was filed one day late (by wife’s present counsel on appeal, Wanda Belle), and the trial court thus properly ruled that wife had not timely filed her notice of intent to move for a new trial. The right to move for a new trial is statutory, and the procedures prescribed by statute must be followed or the right cannot be exercised. (*Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 337-339.) Moreover, section 473, subdivision (b), authorizing relief from judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect cannot be used to extend the time for filing a motion for a new trial. (*Advanced Building Maintenance v. State Comp. Ins. Fund* (1996) 49 Cal.App.4th 1388, 1393.)

In any event, even if the motion for a new trial had been timely filed, the trial court indicated the motion would be unavailing. We acknowledge that the complete abandonment by counsel of a client’s case without any notice or reason to anticipate the abandonment may constitute an accident or surprise and thus warrant the granting of a

new trial. (*Peoples F. & T. Co. v. Phoenix Assur. Co.* (1930) 104 Cal.App. 334, 336-337.) However, a statutory prerequisite for granting a new trial on such a basis is that the accident or surprise must be of the type “which ordinary prudence could not have guarded against.” (§ 657, subd. 3.)

Here, the trial court observed that it would have denied the motion on the merits because wife’s prior counsel (Thomas R. Lee) had a history of failing to show up, the trial date had previously been continued because of counsel’s inexplicable failure to appear, wife admitted she had not been in touch with her own lawyer, and she thus failed to protect herself from the foreseeable consequence of her lawyer’s inaction. The trial court found that wife’s attorney had neglected her long before the two trial dates and that wife had unreasonably failed to protect herself. The trial court’s finding in that regard was well within its broad discretion. (See *Wilson v. Kopp* (1952) 114 Cal.App.2d 198, 206.)

Accordingly, the trial court did not err in denying the untimely motion for a new trial.

II. The judgment may not be attacked under section 473, subdivision(b) on grounds of attorney neglect because that provision applies to defaults, and here there was a contested trial.

No default or default judgment.

When relief is sought under section 473 on the grounds of attorney neglect, it is limited to setting aside a “default entered by the clerk” or a “default judgment or dismissal.” (§ 473, subd. (b).) In the present case, however, there was a contested trial and a judgment on the merits.

Where a party has had its opportunity for a day in court and has contested the matter, section 473 does not apply. (*Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1444; see *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1820-1821.) Wife admitted that she had contacted her attorney’s office on the day of trial and was advised that her attorney would not be appearing at trial and that she should not stay for the trial. Nonetheless, wife told the court that she had as much

“paperwork” as she needed to try her case, and she voluntarily stayed and chose to testify without her attorney. The court even deferred hearing husband’s unopposed motion in limine to exclude witnesses and exhibits for failure to comply with the trial court’s orders and the Family Code (requiring that wife serve declarations of disclosure detailing all of her assets and ownership interests) until after the case was presented, thus permitting wife to present her case. Also, there was only approximately an hour of court time during the first day of trial, and on the second day of trial wife advised the court that she had written down in advance her questions and intended answers, further indicating the contested nature of the trial.

Section 473 is interpreted strictly, and it is not sufficient that the judgment was in some sense “in the nature of a default.” (*English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 148.) Here, the situation was not even in the nature of a default because wife voluntarily chose to participate and testified at trial (compare *Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 299), and thus there is no basis for the application of section 473.

Fatal procedural flaws.

Additionally, when a section 473 motion is made after entry of judgment, notice of the motion must be served on the party; service on the party’s attorney of record is not sufficient. (Fam. Code, § 215.) Wife’s notice of motion was filed after entry of judgment but was only served on husband’s attorney. Also, the motion was not filed with any pleading proposed to be filed, and thus was properly denied for that additional reason. (§ 473, subd. (b).)

Accordingly, the court did not err in denying the section 473 motion.

III. Other issues.

Husband’s motion in limine.

Wife complains that the court erred in granting husband’s motion in limine to exclude wife’s evidence (i.e., her testimony) for violations of various court rules regarding the production of documents, as set forth in husband’s motion. Wife properly contends that “a failure to comply with [local court] rules is the responsibility of counsel

and not of the party, [and] any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto." (§ 575.2, subd. (b).)

However, husband's motion in limine was based not only on the violation of court rules, but was also based on the failure to comply with court orders and the failure to comply with statutory disclosure requirements. As noted by husband, wife failed to provide trial briefs as ordered by the court and failed to file her preliminary and final declarations of disclosure, as required by Family Code sections 2104 and 2105. Thus, the court properly granted the motion in limine.

Request for a continuance.

Nor did the trial court abuse its discretion in denying the request of an attorney who specially appeared to seek a continuance. When asked by the court for the grounds for the continuance, the attorney explained that he had been contacted by "an appearance company" and asserted that the grounds for the continuance were merely that "that Mr. Lee couldn't be here today." The attorney requesting the continuance did not know where Lee was that day and offered no specific reason for his absence. Approximately three weeks earlier, the court had continued the trial date when Lee inexplicably failed to appear for trial. On this second occasion of Lee's failure to appear for trial, the court took the matter off the morning calendar, urged wife to telephone Lee (whose office claimed some "paperwork" was missing), and then denied the appearance attorney's unexplained request to continue the trial. Under the totality of the circumstances, the court did not abuse its broad discretion, as its ruling was not arbitrary or capricious, and it did not exceed the bounds of reason. (See *Estate of Gilkison v. King* (1998) 65 Cal.App.4th 1443, 1448-1449.)

Husband's request for sanctions on appeal.

Finally, at the conclusion of husband's reply brief in this appeal, he requests that we deem wife's appeal frivolous and impose monetary sanctions against wife and her counsel. We decline to consider this informal request, however, because it "must" be made in the form of a proper motion with a supporting declaration. (Cal. Rules of Court, rule 8.276, subd. (b)(1).)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.